STRAITS SETTLEMENTS REPORTS.

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[ORIGINAL CIVIL JURISDICTION]
McELWAINE, C.J.

February 26, 1941.

JAMBALINGAM SAMINATHAN also spelt as SAMINADEN

vs.

ANTONIAMMAL SAMINATHAN & ANOR.

[SINGAPORE IN FORMA PAUPERIS DIVORCE No. 6 of 1940]

Divorce—Domicil of choice—Animus manendi—Delay in presentation of petition—Presumption of acquiescence—Damages.

On the facts of the case it was held that the Petitioner who was born in India had acquired a domicil of choice in the Straits Settlements. Delay in presentation of a divorce petition may give rise to a rebuttable presumption of acquiescence, connivance or collusion.

Held, on the facts of the case that such presumption of acquiescence was negatived in this case.

The Petitioner lived and cohabited with his wife the Respondent for two months after their marriage. During this time the Petitioner was bound over for assaulting the Respondent. After two months the Respondent left her husband and subsequently after the lapse of more than a year she committed misconduct with the Co-respondent.

Held, that the Petitioner was not entitled to damages against the Co-respondent.

Cases referred to:—

(1) *Russell v. Russell,* (1924) A.C. 687.
(2) *Wilson v. Wilson,* 2 P. & D. 446.
(3) *Tollemache v. Tollemache,* 1 Sw. & Tr. 557.
(4) *Pellew v. Pellew,* 1 Sw. & Tr. 553.
(5) *Binney v. Binney & Hill,* 1936 P. 178.
(6) *Short v. Short,* 3 P. & D. 193.
(7) *Rickard v. Rickard and Bond,* 37 T.L.R. 511.
(8) *Johnson v. Johnson,* 1901 P. 193.
(9) *Mason v. Mason & McClune,* 7 P. Div. 233.
(10) *Coppinger v. Coppinger & Lutwyche,* 34 T.L.R. 588.
(11) *Edwards v. Edwards,* 17 T.L.R. 38.
(12) *Harrison v. Harrison,* 3 Sw. & Tr. 362.
(13) *Mason v. Mason,* 8 P. Div. 21 (C.A.)
(14) *Apted v. Apted & Bliss,* 1930 P. 254.

PETITION.

J. C. Cobbett for Petitioner.

H. A. R. Paulusz for Co-respondent.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

McElwaine, C.J.—In this case the evidence completely satisfies me that the respondent has committed adultery with the co-respondent and has lived with him as his mistress for five or six years.

I arriving at this finding have paid no attention to that part of the petitioner's evidence in which he denies the paternity of the child born on the 28th April 1936 more than two years after the respondent left the petitioner. I am not called upon to decide whether in proceedings under the Divorce Ordinance the rule in *Russell v. Russell*[1] is not ousted by s. 121 of the Evidence Ordinance though it is possible that *Russell v. Russell*[1] even if not applicable in proceedings under the local ordinance may be applicable in cases under the Indian and Colonial Divorce Acts 1926 and 1940.

Three points now require consideration, domicile, delay, damages.

The petitioner is a native of the Madras Presidency in India. He was born a Hindoo. In 1924 he adopted the Christian religion and as a consequence became estranged from his family. In 1926 he left India and came to Penang in this Colony where he was employed for about two years. He then came to Singapore where he has remained ever since. He has never been back to India. He swears that it is his intention to remain in Singapore, that he does not want to go back to India and that he wishes to spend the rest of his life in Singapore.

Usually, in cases where the domicile of origin has been changed to a domicile of choice evidence is given of valuable business interests and of landed property as factors anchoring the person to his new home. No such evidence exists in this case. Since 1935 the petitioner appears to have been far from prosperous, yet he has remained here, when he might, had he so desired, have returned to the land of his birth.

I think this circumstance adds weight to his testimony that he intends to remain for the rest of his life in the Straits Settlements.

"If the Court sees no reason—and I see none—to doubt the man's word, why should it not believe him". This was said on a question of domicile in *Wilson v. Wilson*[2].

Taking his abandonment of the religion of his birth and his residence for now more than fourteen

years in this Colony into consideration I accept his evidence and find that he has the *animus manendi* and that he has acquired a domicile of choice in the Straits Settlements.

There has been great delay in presenting this petition.

According to the petition and to the evidence the respondent has been committing adultery with the co-respondent since early in 1935, she having left the petitioner in January 1934. In September 1936 he wrote to the Roman Catholic Bishop about the matter but took no steps to seek legal relief until he petitioned the Court for leave to bring divorce proceedings *in forma pauperis* on the 29th February 1940.

The Divorce Ordinance (Cap. 84) s. 9 sub-s. 2 enacts that the Court shall not be bound to grant a decree of divorce if it finds that the petitioner has been guilty of unreasonable delay in presenting or prosecuting the petition. It is a matter of judicial discretion unless the Court thinks that the delay shows the petitioner to have been accessory to or conniving at his wife's adultery in which case s. 8 requires the Court to dismiss the petition.

Delay means "culpable delay somewhat in the nature of connivance or acquiescence" *Tollemache v. Tollemache*[3] or "equivalent to condonation" *Pellew v. Pellew*[4], something in the nature of acquiescence such as shows the petitioner to have been insensible to the loss of his wife" *Binney v. Binney & Hill*[5]. See too *Short v. Short*[6].

In *Rickard v. Rickard and Bond*[7] an ulterior motive was held to be no excuse for delay. The Court referred to *Johnson v. Johnson*[8] in which Jeune P. said "I may add that the reasons why this Court insists on steps being taken promptly, if they are taken at all, and why it should be very strenuous on the subject of delay, are that it is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery".

The petitioner put in copies of his letters to the Roman Catholic Bishop dated 15th September 1936 and 25th February 1937 as indicating that he was not acquiescing. The first of these letters was written more than two and a half years after his wife had left him, and about a year and a half after she had commenced her association with the co-respondent. In *Mason v. Mason & McClune*[9] four years was held to be unreasonable delay. I shall refer again to this case. In *Coppinger v. Coppinger & Lutwyche*[10] the fact that the petitioner had religious scruples was held to be no sufficient excuse for a delay of three and a half years.

But it is stated in *Rayden* and *Mortimer* 3rd Edn. p. 125 and 10 *Hailsham*, s. 1014 that poverty is almost always a sufficient excuse.

Poverty appears to have been regarded as an excuse in *Wilson v. Wilson*[2] though in that case there was another adequate excuse. Poverty was also an excuse in *Edwards v. Edwards*[11] and in *Harrison v. Harrison*[12]. *Mason v. Mason*[9] went to the Court of Appeal (13) when the Court allowed evidence of poverty to be given and holding that this was a reasonable excuse. Lindley, L.J. and Bowen, L.J. said that the further evidence which they had heard had explained the delay which without that explanation would have seemed unreasonable. That was in 1883.

The position is this—delay gives rise to a presumption of acquiescence, connivance or condonation, but this presumption may be rebutted. If the Court is satisfied that owing to want of money the petitioner did not sue earlier that presumption is rebutted.

My difficulty is that in 1940 the petitioner sued *in forma pauperis*. He was unemployed in 1935 and has had no regular work since. I see no reason why he could not have sued *in forma pauperis* in 1935.

In England a poor person was entitled to sue *in forma pauperis* at common law before the right was affirmed by Henry VII c. 12, so I think it possible that when English Courts speak of poverty as an excuse they mean inability through lack of means to collect necessary evidence and that real poverty which consists in having more than the maximum property allowed as a basis for leave to sue *in forma pauperis* and not enough to enable him to pay the ordinary expenses of litigation is what is meant.

In *Johnson v. Johnson*[8] Jeune P. thought a wage of £3- per week received by the petitioner who owed a quarter's rent and other debts amounting to £20- sufficient to enable the petitioner to sue.

I have not access to the English Poor Persons Rules as they were in 1901 but under the present rules it is only in exceptional cases that a person receiving upwards of £2- per week would be admitted to sue as a poor person.

Unless the cost of obtaining evidence is to be taken into consideration (in this case such cost must have been very small indeed) I see no difference between a very wealthy petitioner and one entitled to sue as a pauper under O. XVI r. 20. Delay in the one case may be just as inexcusable as in the other.

But inability to sue owing to the petitioner's poverty is not the only circumstance which can rebut the presumption of acquiescence, connivance or condonation.

The petitioner as I have said wrote to the Roman Catholic Bishop invoking his help on the 15th September 1936. On the 16th May 1936 he would appear to have objected to the baptism of the child. However, unreasonable this objection may have been it appears to have been intended as a protest against his wife's mode of life.

Taking into consideration the petitioner's station in life, I think I can take it that at any rate within a year and a half of the commencement of the adulterous association of his wife and the co-respondent he did take some step however ineffectual and futile to protest against his wife's adultery and this negatives the presumption of acquiescence. I do not believe there was actual connivance or condonation or real acquiescence.

It must be appreciated too that the protests to which I have referred were made to the Clergy of a Church which frowns on divorce and it may therefore be taken that they did not suggest to this humble man that his proper redress was to be sought in the divorce Court.

But what of the delay in suing after he had no reply from the Bishop to the letter of the 15th September 1936 or to the reminder of the 25th February 1937? The petitioner in his evidence offered the following explanation:—

> "I have waited because I wanted to know the result of my application to the Bishop. The Tamil priest said the matter was being referred to the Pope".

I should doubt whether the Tamil priest said anything of the kind. But I am not disposed to reject this piece of evidence *in toto*. I think it quite probable that the petitioner did speak to the Tamil priest—he sent a copy of his letter to the Bishop to the priest. I also think it quite possible that the priest may have made some remark to the effect that even a Bishop could not nullify the marriage and that such matters had to be referred to Rome. Some such casual remark as this may have been taken up by the petitioner as meaning that his petition had been sent to Rome.

The petitioner is a Tamil, a convert from Hindooism to the Roman Catholic Church and he may have thought that the Church could dissolve a marriage celebrated by the Church and that such dissolution would be valid for all purposes.

In this case I consider these circumstances as being so probable that I accept them as facts which account for the delay. There is no ulterior purpose to account for the delay.

As is pointed out in *Apted v. Apted & Bliss*[14] in recent years the Courts have tended to exercise their discretion in favour of petitioners much more freely than formerly, though such exercise is not and should not be an uncontrolled exercise.

In dealing with delay I am dealing with a factor which gives rise to a presumption of wrongful conduct on the part of the petitioner; a presumption which can be rebutted and in this case I think the presumption is rebutted.

No useful purpose would be served by taking a narrow view of the case. Such a view would not advance the morals of these people. For years the respondent and co-respondent have lived in what appears to be a happy though illicit relationship. The co-respondent is a bachelor. Divorce will enable them to regularise their position.

I exercise my discretion under s. 9 sub-s. 2 of the Divorce Ordinance in favour of the petitioner and I grant a *Decree Nisi*. Application to make absolute may be made after the expiration of three months.

There remains the question of damages. Damages in divorce are said to be compensatory, not punitive though the conduct of co-respondent has been taken into account in assessing damages.

There has been nothing treacherous or dishonourable in the conduct of the co-respondent. He did not entice this wife from her husband. He did not misbehave with her for over a year after she left her husband.

What has the husband lost through losing a wife whom he says he was deceived into marrying? Her mother lived with them during their married life of two months together. She did the cooking.

The petitioner was bound over for assaulting his wife during this short time. While I think the wife's

evidence exaggerated it is obvious that this marriage has not been a happy one. I do not think it a case for damages and I award none.

The co-respondent knew that the respondent was a married woman. Under O. XVI r. 21 (2) and 25 (1) I order him to pay as costs the Court fees which the petitioner would have had to pay had these proceedings not been *in forma pauperis*.

Decree Nisi.

[ORIGINAL CIVIL JURISDICTION]

CAREY, J.

March 12, 1941.

MELAH BINTI INDOT (f) ADMINISTRATRIX OF THE ESTATE OF CHE PAH alias PAH BINTI KASAH DECEASED

vs.

TAMBYSAH BIN HAJI KASSIM & ORS.

[PENANG IN FORMA PAUPERIS SUIT No. 52 of 1940]

Limitation Ordinance (Cap. 16)—Adverse possession—Claim by representative of deceased person against adverse possessor.

In the case of a claim to immovable property made by the representative of a deceased person against an adverse possessor, time runs in favour of the possessor notwithstanding that no grant of representation to the estate of the deceased has been taken out. One of the two tenants in common can by adverse possession acquire a right against the other tenant in common; this depending upon whether his possession was adverse in fact.

Cases referred to:—

(1) *In re Ena Mohamed Tamby deceased,* (1932), 1 M.L.J. 128.
(2) *Sultan bin Hashim v. Lamsah,* 5 S.S.L.R. 61.
(3) *Ismail bin Savoosah v. Madinasah Marican,* 4 Ky. 311.
(4) *Murray v. The East India Co.* (1821), 5 Barn & Ald. 204.
(5) *Corea v. Appuhamy & Anor.* (1912), A.C. 230.
(6) *Meyappa Chetty v. Supremanian Chetty* (1916), A.C. 603.
(7) *Hee Ann Hup v. Kolanthavan Chetty* (1923), 15 S.S.L.R. 249.
(8) *Ho Yang Peng v. Talib bin Haji* (Singapore). Suit No. 75 of 1929 (unreported).
(9) *In re Marie Louise Caunter deceased,* 7 M.L.J. 174.

TRIAL.

K. S. Pillai for plaintiff.

Lim Cheng Ean for 1st, 2nd and 3rd defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Carey, J.—The Plaintiff's claim is as the administratrix of the estate of Che Pah binti Kasah deceased.

(a) for possession of the one-half undivided share of the land known as Lot 181 Mukim H South West District Penang wrongfully sold and conveyed by the 1st defendant to the 2nd defendant on the 12th day of July 1937 who in turn sold the same to the 3rd defendant on the 9th day of August 1937 and the said 3rd defendant who is the present owner mortgaged the same to the 4th defendant on the 17th day of March 1939;

(b) to set aside the said conveyance dated the 12th day of July 1937, 9th day of August 1937 and the mortgage dated the 17th day of March 1939 and thereafter for rectification of Register by cancellation of entries made therein;

(c) to have an account of the income and expenditure in respect of the said land and payment to the plaintiff of any balance found due by the defendants to the plaintiff from the date of conveyance by the 1st defendant up to date hereof;

(d) further and other reliefs; and

(e) costs.

In the statement of claim the plaintiff averred that Che Pah died about 27 years ago and at the time of her death was seized in fee simple and in possession of one-half undivided share of the land known as Lot 181 Mukim H South West District Penang. That after Che Pah's death her husband, Indot, the plaintiff's father was in possession on behalf of Che Pah's next of kin and that after his death the plaintiff about 7 years ago came into possession of the said undivided half share. That on the 12th July 1937 the 1st defendant, after making a Statutory Declaration that he had been in adverse possession of the said undivided half share, wrongfully sold and conveyed the same to the 2nd defendant who in turn on the 9th August 1937 sold to the 3rd defendant who has mortgaged the said share to the 4th defendant.

That by operation of law the said half undivided share became vested in the plaintiff as administratrix of Che Pah deceased.

The 1st defendant in his statement of defence says he sold the said share on the 12th July 1937 and delivered up possession thereof to the 2nd defendant after having been in adverse possession thereof for more